

July 7, 2017

Mr. Christopher Kirkpatrick
Secretary
U.S. Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Re: Chief Compliance Officer Duties and Annual Report Requirements for Futures Commission Merchants, Swap Dealers, and Major Swap Participants; Amendments

Dear Mr. Kirkpatrick:

The International Swaps and Derivatives Association, Inc. (“ISDA”)¹ appreciates the opportunity to submit these comments on the proposed revisions to the Chief Compliance Officer Duties and Annual Report Requirements for Futures Commission Merchants, Swap Dealers, and Major Swap Participants (“Proposal”) published by the U.S. Commodity Futures Trading Commission (“CFTC” or “Commission”) on May 8, 2017.²

We recognize the Commission’s efforts to promote accountability and a more effective compliance and control framework by aligning responsibilities to the personnel best suited to carry out these obligations, in line with well-established business practices and other regulatory requirements. We support the Commission’s proposed revisions to the

¹ Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 850 member institutions from 66 countries. These members comprise a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearing houses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association’s website: www.isda.org.

² Chief Compliance Officer Duties and Annual Report Requirements for Futures Commission Merchants, Swap Dealers, and Major Swap Participants; Amendments 82 Fed. Reg. 21330 (May 8, 2017) [hereinafter Proposed Rule].

content of the Annual Compliance Report. The current requirements encourage a “check-the-box” approach to compliance, rather than promoting a more proactive, on-going self-assessment focused on the risks identified by each firm. We believe that the proposed revisions would strike a proper balance between providing the Commission with meaningful analyses of firms’ compliance programs and conserving the time and resources of both the Commission and firms.

While we commend the Commission’s efforts to harmonize its rules with the U.S. Securities and Exchange Commission (“SEC”) CCO rules for security-based swap dealers and major security-based swap participants, we believe that the Commission’s Proposal, in certain instances, pursues harmonization absent a consideration of whether the SEC’s approach imposes regulatory burdens without achieving associated risk-reducing benefits.³ Additionally, we note that complete harmonization with the SEC rules may not always be the best approach, given the different nature of swap dealers and security-based swap dealers.

As discussed more fully below, we believe that adopting the following recommendations will further refine and balance the Commission’s goals of simplification and harmonization, while recognizing aspects of the current framework that have not presented any issues since the enactment of the rule in 2012:⁴

- Clarify in the rule or preamble that the Commission understands the duty to “administer” the registrant’s policies and procedures to mean reviewing, evaluating, and advising the registrant with respect to the development and implementation of its policies and procedures.
- Add a materiality qualifier to the duty to take reasonable steps to minimize conflicts of interest in order to further harmonize with the SEC rule and properly limit the CCO’s role to addressing only those conflicts that have the potential to pose significant risk to the registrant.
- Abandon the proposed requirement to furnish the Annual Compliance Report to the senior officer, board of directors, and audit committee. Alternatively, require the registrant to submit the Annual Compliance Report to the senior officer⁵ or

³ 17 C.F.R. § 240.15Fk-1.

⁴ Consistent with the proposed recommendations, we ask that the CFTC incorporate the above noted suggestions and make conforming changes to related sections in Staff Advisory No. 14-153. *See* CFTC Staff Advisory No. 14-153 (Dec. 22, 2014), available at <http://www.cftc.gov/idc/groups/public/@llettergeneral/documents/letter/14-153.pdf>.

⁵ We appreciate the Commission’s efforts to further clarify that “senior officer” means “the chief executive officer or other equivalent officer of the registrant.” In this regard, we ask that the CFTC

the board of directors or the audit committee. At a minimum, allow the registrant to provide the Annual Compliance Report to the audit committee and board of directors at the next committee meeting and board meeting respectively, after the deadline to file the Annual Compliance Report with the Commission.⁶

- Further revise the requirement to disclose and quantify compliance resources in the Annual Compliance Report to require, instead, a qualitative assessment of the sufficiency of the registrant’s resources to comply with the requirements of the Commodity Exchange Act (“CEA”) and Commission regulations related to its business as a futures commission merchant (“FCM”), swap dealer (“SD”), or major swap participant (“MSP”).⁷

Critically, and distinctly, we ask that the Commission further review its existing CCO rules and Proposal to ensure that it is in line with the objectives of Acting Chairman Giancarlo’s project KISS—an initiative to apply the Commission’s rules in ways that are more straightforward and cost-effective. In light of this effort, we have identified other areas in which the CCO rules impose unnecessary and unduly burdensome requirements on firms and, accordingly, request that the Commission, in its final rulemaking:

- Amend the Commission’s current certification requirement⁸ to require the CCO or CEO to certify that the Annual Compliance Report is complete and accurate “in all material respects.”

clarify in the rule or preamble that the registrant has the flexibility to determine which individual would qualify as an “equivalent officer.”

⁶ We appreciate that the Commission recognizes that a registrant may not have a board of directors and, in that case, the registrant would only be obligated to furnish its annual report to the senior officer and audit committee. *See Proposed Rule, supra* note 2, at 21334 n. 47. However, we note that an FCM, SD, or MSP may, under certain circumstances, not have an audit committee. Thus, if the Commission decides to proceed with its revisions to § 3.3(f) we ask the Commission to further clarify in its final rulemaking that if the registrant does not have an audit committee, it should provide the Annual Compliance Report to the independent senior level audit personnel of the registrant.

⁷ Additionally, we note that § 3.3(d)(4) of the Proposal would require that CCOs establish, maintain, and revise written policies and procedures reasonably designed to remediate noncompliance issues identified by the CCO through, among other things, a complaint that can be validated. In an effort to provide legal certainty to registrants, we ask that the Commission clarify the term “complaint that can be validated” to mean a written complaint that can be supported upon a reasonable investigation. These clarifications would help to better align the Commission’s rules with the SEC CCO rules and would give registrants legal certainty by providing them with an objective test of the types of noncompliance issues that require escalation to the CCO.

⁸ 17 C.F.R. § 3.3(f)(2).

- Acknowledge that the Annual Compliance Report need not address a firm’s compliance with respect to the Volcker rule given that it would be duplicative of the Volcker rule’s provisions for compliance program requirements.

I. Chief Compliance Officer Duties

A. The Duty to Administer the Registrant’s Compliance Policies and Procedures Should be Assigned to Senior Officers Based on their Experience.

We appreciate the Commission’s clarification that the CCO duty to administer each of the registrant’s compliance policies and procedures is limited to those policies and procedures relating to the registrant’s business as an FCM, SD, or MSP. However, we believe that such duty remains impracticable and places an undue burden on CCOs. CCOs do not necessarily “administer” or execute each and every policy and/or procedure relating to an applicable CFTC rule. For example, business units and other control functions within a firm, such as Operations, Technology, Risk, Finance, Compliance, Legal, and Human Resources, establish policies and procedures for their respective areas of responsibility. Ultimately, the chief executive officer or other senior officer has the ultimate supervisory authority to enforce compliance with these policies and procedures.

As a result, the proposed rule may have the unintended consequence of shifting certain regulatory responsibilities from other senior officers, who have direct knowledge, expertise, and accountability with respect to a particular matter. Thus, we believe that proposed § 3.3(d)(1) should be changed to clarify and align the CCO’s duties with well-established internal practices and other regulatory frameworks. We propose that the Commission adopt the following language:

Reviewing, evaluating, and advising the registrant on the development, implementation, and monitoring ~~Administering each~~ of the registrant’s policies and procedures relating to its business as a futures commission merchant, swap dealer, or major swap participant that are required to be established pursuant to the Act and Commission regulations.

If the Commission decides to keep the term “administering” in § 3.3(d)(1) then the Commission should clarify that, consistent with the preamble to the SEC rule,⁹ the duty to “administer” the registrant’s policies and procedures means reviewing, evaluating, and

⁹ Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants; Final Rule, 81 Fed. Reg. 29960, 30057 (May 13, 2016) [hereinafter SEC Final CCO Rule].

advising the registrant with respect to the registrant's CEA compliance policies and procedures.

In sum, absent further revisions, the proposed changes do not accurately reflect the CCO's duties and responsibilities and promote accountability across the internal operations of firms. If left unchanged, the proposed language would inadvertently reduce the direct involvement of other senior officers with more direct knowledge, expertise and responsibilities for various regulatory requirements.

B. Duty to Resolve Conflicts of Interest Should be Further Clarified

We fully support the Commission's proposed revisions to § 3.3(d)(2), clarifying that the CCO's duty with respect to resolving conflicts of interest is limited to taking "reasonable steps" to resolve conflicts of interest. We agree with the Commission that this duty "should not be interpreted to require the CCO to personally resolve every potential conflict of interest that may arise or require consultation with the board of directors."¹⁰ We believe that the Commission should further clarify § 3.3(d)(2) to state that the CCO's duty is limited to resolving *material* conflicts of interest, as opposed to *any* conflicts of interest. Adding a materiality qualifier to § 3.3(d)(2) is consistent with the Commission's intent to require the CCO to get involved with issues of significant importance and not day-to-day matters that do not require escalation. Moreover, adding a materiality qualifier would further harmonize the Commission's CCO rules with the SEC CCO rules.¹¹

Additionally, consistent with the SEC's view,¹² the Commission should explicitly state that the primary responsibility to "resolve" conflicts of interest ultimately falls on the registrant—not the CCO—and that the CCO's role would include identifying, advising and escalating, as appropriate, matters involving material conflicts of interest to senior officers. Further, the Commission should recognize that processes for addressing conflicts of interest should be tailored to the size, scope, structure, and risks of a particular firm, rather than imposing full responsibility on the CCO, as other personnel in the firm may also have responsibilities with respect to the handling and management of conflicts of interest. While the Commission acknowledges this notion in its Proposal,¹³

¹⁰ Proposed Rule, *supra* note 2, at 21332.

¹¹ 17 C.F.R. § 240.15Fk-1.

¹² SEC Final CCO Rule, *supra* note 9, at 30057.

¹³ *See* Proposed Rule, *supra* note 2, at 21332 ("Similarly, the SEC in its adopting release noted that the CCO's role in resolving conflicts of interest would likely include the recommendation of actions to resolve the conflict, as well as the escalation and reporting of issues related to resolution, but not executing the business decision").

the proposed rule's use of the word "resolve", without further clarification, does not seem to reflect this intent. Accordingly, we ask that the Commission provide further guidance in its final rulemaking that the term "resolve" means escalating to senior officers, and advising the registrant on, matters involving material conflicts of interest. Alternatively, we ask that the Commission change the term "resolve" to "minimize" to reflect the nature of conflicts of interest.

C. The Duty to Ensure Compliance Should be Further Aligned with the SEC Rule

We appreciate that the Commission recognizes, under the current rules, that CCOs are assigned a challenging responsibility to ensure full compliance with virtually each and every obligation under the CEA, making CCOs potentially liable for activities over which they have no knowledge or control.

We remain concerned, however, that the proposed revisions still impose a heavy burden on CCOs and, therefore, recommend that the Commission further refine its Proposal to require the CCO to "take reasonable steps to ensure that the registrant establishes, maintains, and reviews written policies and procedures reasonably designed to achieve compliance." This requested change would further align the Commission's rule with the SEC's rule¹⁴ and is consistent with the Commission's intent to address industry concerns that ensuring full compliance with the CEA is an impracticable standard for CCOs.¹⁵

II. Annual Compliance Report

A. Furnishing the Annual Compliance Report to the Board and Audit Committee Prior to Filing the Annual Compliance Report with the Commission is Impracticable and Unnecessary

We are troubled by the Commission's proposed revisions to § 3.3(f) which would require a registrant to provide its Annual Compliance Report to its audit committee, board of directors, and senior officer prior to furnishing the report to the Commission. The Commission did not identify any concerns with the current requirements in § 3.3(f) to warrant the adoption of a stricter requirement, other than the intent to harmonize its rule with the SEC rule. We note that regulatory harmonization does not mean replacing more efficient rules with more burdensome requirements for harmonization's sake. Rather, it requires a thorough review of current rules to determine the most efficient approach and then harmonizing that approach, where appropriate. Accordingly, we recommend that the

¹⁴ 17 C.F.R. § 240.15Fk-1(b)(2).

¹⁵ See Proposed Rule, *supra* note 2, at 21332-33.

Commission abandon the proposed revisions to § 3.3(f) as it would create more regulatory burdens and added costs given that the relevant audit committee(s) and board of directors do not necessarily meet prior to the deadline to file the Annual Compliance Report with the Commission. Alternatively, we ask that the Commission require the registrant to submit the Annual Compliance Report to the senior officer or the board of directors or the audit committee.¹⁶

Should the Commission decide to proceed with its proposed revisions, we ask that the Commission, at a minimum, allow the registrant to provide the Annual Compliance Report to the audit committee and board of directors at the next committee meeting and board meeting respectively, after the deadline to file the Annual Compliance Report with the Commission.

B. Burdensome Compliance Resource Allocation Disclosure Requirements

We appreciate the Commission's acknowledgment that the Annual Compliance Report should only be required to discuss the registrant's resources allocated for compliance with respect to its business as an FCM, SD, or MSP. We remain concerned, however, that the requirement is still unduly burdensome as the registrant is expected to quantify, in a significantly detailed manner, its resource allocation in the Annual Compliance Report as a result of Staff Advisory No. 14-153.¹⁷ We note, however, that any exercise in quantifying resources is always an educated guess at best, and the varying methodologies that may be employed by registrants to quantify resources prevent the Commission from engaging in an "apples to apples" comparison.

A better approach would be to require the registrant to perform an assessment of the sufficiency of its resources dedicated to compliance. In other words, the Commission should require the Annual Compliance Report to provide a narrative that describes the registrant's assessment of the sufficiency of its resources dedicated to compliance, in lieu of quantifying its resources or providing the Commission with hard numbers.

¹⁶ We further note that non-U.S. swap dealers have business models, corporate forms, and organizational structures that may be different from their U.S. counterparts. As a result, we request that the Commission enable registrants to submit the Annual Compliance Report to either the senior officer, the board of directors, or the audit committee. This requested change is pertinent to the ability of numerous non-U.S. swap dealers to comply with the rule and would account for their varying organizational structures. If this change is not made, the Commission would subject these firms to additional costs and regulatory burdens, putting these firms at a competitive disadvantage with their U.S. counterparts.

¹⁷ CFTC Staff Advisory No. 14-153 (Dec. 22, 2014), available at <http://www.cftc.gov/idc/groups/public/@lrllettergeneral/documents/letter/14-153.pdf>.

Accordingly, we suggest that the Commission consider the following revisions to proposed § 3.3(e)(4):

The annual report shall, at a minimum, contain a description of the sufficiency of the registrant's financial, managerial, operational, and staffing resources set aside for compliance with respect to the Act and Commission regulations relating to its business as a futures commission merchant, swap dealer or major swap participant, including any material deficiencies in such resources.

We believe that requiring a qualitative, rather than quantitative, assessment of resources will provide the Commission with a more meaningful understanding of a firm's compliance program. Moreover, our proposed revision is consistent with the Commission's goal to encourage a qualitative, substantive analysis of compliance issues.¹⁸

III. Other Concerns

A. Liability for Certification

Current § 3.3(f)(3) requires the registrant's CCO or CEO to certify that the Annual Compliance Report is accurate and complete under penalty of law. The Commission has stated that, under such provision, "administrative, civil, and/or criminal liability could be imposed on the registrant or the certifying officer or both, either directly or vicariously."¹⁹ We note that in other contexts where certifications "under penalty of law" have been required, the phrase has been interpreted to impose criminal liability only where the certifier has been informed of inaccuracies and nonetheless certifies the accuracy of the document, and not merely where the information within the document is later determined to be inaccurate.²⁰ Accordingly, we ask the Commission add a materiality qualifier to the certification requirement, so that the CCO or CEO would only certify that the Annual Compliance Report is accurate and complete in all material respects.

¹⁸ See Proposed Rule at 21333-34 (noting that the proposed revisions to the contents of the CCO Annual Report are intended to encourage a qualitative, substantive discussion regarding areas of improvement and recommended changes to compliance programs, among other things).

¹⁹ 77 Fed. Reg. 20163 (2012).

²⁰ See *United States v. Hopkins*, 53 F.3d 533, 542 (2d Cir. 1995) (affirming conviction where certifier was presented with information that reports were false).

We believe that the requested change will appropriately address concerns that the CCO or CEO should not be held criminally liable for immaterial misstatements, omissions, or other inaccuracies in the Annual Compliance Report. Additionally, this requested change will further align the Commission's rule with the SEC's rule and is consistent with the Commission's overall objective of achieving rule harmonization.²¹

B. Volcker Rule

We appreciate the Commission's efforts to reduce compliance burdens and provide more efficient regulatory oversight. We believe there is an opportunity for the Commission to further streamline its CCO rules and address concerns regarding the footnote in the Commission's Volcker rule that requires SDs to incorporate their Volcker compliance program requirements²² into the Commission's CCO duties and Annual Compliance Report requirements.²³ To further alleviate CCO compliance challenges, we ask that the Commission remove the requirement in the current rules that SDs or FCMs address Volcker compliance program requirements under § 3.3.²⁴

By way of background, we note that the public was not provided with the opportunity to comment on this specific application of the Volcker rule. Additionally, following the adoption of the Volcker rule, CFTC staff issued an advisory²⁵ expanding this requirement to include FCMs that are banking entities.

The practical effect of this requirement is that firms are now expected to establish policies and procedures related to compliance with the Volcker rule under both the CCO compliance regime (§ 3.3) and the Volcker compliance regime (§ 75.20). Duplicative Volcker compliance obligations imposed at the firm-wide level and the registrant-level (which is only a part of the firm) lead to increased compliance costs and decreased efficiencies.

²¹ 17 C.F.R. § 240.15Fk-1(c)(2)(ii)(D).

²² Subpart D of Part 75 of the Commission's Regulations.

²³ Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds; Final Rule, 79 Fed. Reg. 5808, 6020 n. 2521 (Jan. 31, 2014).

²⁴ Alternatively, we ask the Commission to provide staff guidance determining that complying with the Volcker rule's compliance program requirements would satisfy the Commission's footnote.

²⁵ DSIO Staff Advisory (not available on the CFTC website, but available at <https://www.bridgingtheweek.com/ckfinder/userfiles/files/DSIO%20CCO%20Volcker%20Advisory.pdf>).

Removing this requirement would be consistent with the Acting Chairman's goals under Project KISS and the Commission's intent to revise the contents of the Annual Compliance Report in order to reduce costs and regulatory burdens.²⁶ We therefore request that the Commission acknowledge in its final rulemaking that the Annual Compliance Report should not include or address the registrant's compliance with respect to the Volcker rule.²⁷

C. Comparability Determination

We also seek clarification that the Commission's proposed changes to the CCO rules will not impact the Commission's foreign jurisdiction comparability determinations with respect to the requirements under § 3.3. Specifically, in December 2013, the Commission determined that certain laws and regulations of Australia, Canada, the EU, Hong Kong, Japan, and Switzerland were sufficiently comparable to the Commission's CCO rules and, as a result, the Commission made substituted compliance available for foreign SDs and MSPs located in those jurisdictions with certain exceptions.²⁸ Thus, we ask that the Commission confirm in its final rulemaking that its changes to the CCO rules will not cause the Commission to revisit its comparability determinations. We trust that the Commission will not revisit this comparability determination and expect that SDs and MSPs operating in the aforementioned jurisdictions can continue to rely on these comparability determinations.

²⁶ Proposed Rule, *supra* note 2, at 21332.

²⁷ However, if the Commission decides to maintain the Volcker rule incorporation into the CCO rules, we ask that the Commission provide guidance within its final rulemaking for firms not subject to the Volcker rule, stating that their Annual Compliance Report does not have to provide an extensive and lengthy explanation as to why their firm is not subject to the Volcker rule.

²⁸ See 78 Fed. Reg. 78864 (Dec. 27, 2013); 78 Fed. Reg. 78839 (Dec. 27, 2013); 78 Fed. Reg. 78932 (Dec. 27, 2013); 78 Fed. Reg. 78852 (Dec. 27, 2013); 78 Fed. Reg. 78910 (Dec. 27, 2013); 78 Fed. Reg. 78899 (Dec. 27, 2013).

IV. Conclusion

We appreciate the opportunity to submit our comments on the Proposal. We commend the Commission for its efforts to simplify and harmonize its rules with the SEC rules and look forward to working with the Commission as it continues to consider these important issues. Our members are strongly committed to maintaining robust and effective compliance programs and hope that the Commission will consider our suggestions, as they reflect the extensive knowledge and experience of compliance professionals within our membership.

Please feel free to contact me should you have any questions or seek any further clarifications.

Sincerely,



Katherine T. Darras
General Counsel
International Swaps & Derivatives Association, Inc.